

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





74-2518 <sup>B</sup>  
To be argued by *Pay*

To be argued by  
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

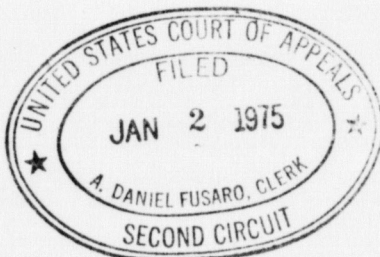
GARY WARREN, a/k/a MICHAEL CHUN,

Appellant.

Docket No. 74-2518

## APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

MICHAEL YOUNG,  
Of Counsel

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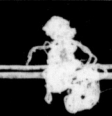


1361-496 WEINSTEIN, J.

and import cocaine with  
intent to distribute etc.

74-2518

ONLY COPY AVAILABLE



DATE	PROCEEDINGS
	a plea of not guilty = bail set at \$100,000 P.R.B. secured by \$2,500 in cash - debt to surrender passport by Nov. 6, 1973 - case adjd to Nov. 14, 1973 at 9: 30 am for pre trial conference.
11-8-73	By Catoggio, Magistrate - Order for acceptance of cash bail filed. (Lester Pape)
11-9-73	Magistrates proceedings filed re defts Costanza & Jenkins received from U.S.Magistrate, Nashville, Tenn. and placed in criminal folder. Appearance Bonds relating to both defts placed in vault.
11-9-73	Before WEINSTEIN J - Case called - debt FERNANDO PARDO & counsel G. Newman present - debt arraigned and enters a plea of not guilty - pre-trial conference set for Nov. 14, 1973. Defts motion for reduction of bail argued and reduced to \$100,000 surety bond or cash.
11-12-73	Notice of Appearance filed(PARDO) ✓
11-13-73	Notice of Motion filed with Memorandum of Law(deft PAPE) for Discovery, Bill of Particulars (ret. Nov. 20, 1973)
11-13-73	Removal Order received from U.S.D.C. for the Middle District of Tennessee and filed (CHARLES COSTANZA AND NANCY JENKINS)
11-14-73	Motion for Bill of Particulars, Memorandum in Support of motion to dismiss the Indictment and Motion to dismiss the Indictment -all filed (received from Chambers(defts Costanza & Jenkins)
11-14-73	Before WEINSTEIN J - Case called - defts & counsels present - defts WARREN & URETA reported fugitives - Motion by defts COSTANZA & JENKINS to dismiss the indictment is denied -So Ordered - Motion by COSTANZA & JENKINS for Bill of Particulars is granted and denied in part - So Ordered. Defts COSTANZA, JENKINS, JULIANI & DE SANTIS arraigned individually and enter pleas of not guilty - motion by debt LOMBARDO to dismiss the Indictment - Decision Reserved - hearing for dismissal set for Nov. 16, 1973 - Discovery to be completed within 2 weeks - trial set for Feb. 4, 1974 at 10:00 am.
11-14-73	Notice of Appearance filed (COSTANZA & JENKINS)
11-14-73	Notice of Appearance filed (LOMBARDO & DE SANTIS)
11-14-73	Notice of Appearance filed (PAPE)
11-14-73	Notice of Appearance filed (JULIANI)
11-16-73	Stenographers Transcript dated 11-14-
11-20-73	Before WEINSTEIN J - case called-motion withdrawn - covered during pre trial conference . (for compelling the prosecution to furnish debt Pape with all statements, written or recorded made to any agency of the Govt etc)



CRIMINAL DOCKET 73CR961

DATE	PROCEEDINGS
11/27/73	Magistrate's file 73M1644 inserted into Criminal file 73CR961
11-27-73	Letter from Judge Weinstein to Gustave Newman filed re:deft Pardo schedule of bail hearing, etc. for 11-30-73
11-30-73	Before WEINSTEIN J - Case called - deft Pardo & counsel G.Newman present - defts application for reduction of bail argued and granted - bail set at \$25,000 cash, \$100,000 bond to be signed by father, deft and Jose D.Rico- trial deemed begun as to deft Pardo as of 11-30-73. Execution of the bond is stayed until Dec. 3, 1973 pending reargument at the Govts request - dec 3,1973 at 9:30 am.
11-30-73	Petition for Writ of Habeas Corpus Ad Testificandum filed.
11-30-73	By WEINSTEIN J - Writ Issued, ret. Dec. 13, 1973.
12-3-73	Before WEINSTEIN,J.- Case called- Deft and counsel present- Bail application reargued- After deft's release he is to appear daily in the Marshals office(PARDO)
12-7-73	Stenographers Transcript dated 11-5-73 filed
12/14/73	Writ ret'd and filed. Executed (SHERRI SEISS)
12-28-73	By WEINSTEIN,J.- Order that the District Attorney for Kings County release the A.U.S.A. Heinemann or any Drug Enforcement Administration Agents under his direction the original tapes recorded in connection with eavesdropping warrants issued against telephone numbers, etc. (COSTANZA)
1-3-74	Before WEINSTEIN J - Case called - motion for bail hearing as to deft Fernando Pardo argued and denied with leave to renew.
1-11-74	Notice of motion to sever the trial of deft Pape from deft Costanza ret. 1-16-74
1-11-74	Notice of readiness for trial filed (COSTANZA)
1-11-74	Notice of readiness for trial filed (PARDO)
1-15-74	Writ ret'd and filed - Executed (Sherri Seiss)
1-15-74	Letter of Jan. 9, 1974 filed from Asst Guy Heinemann to Dale Quillen, Esq.received from Chambers .
1-16-74	Letter dated Jan. 15, 1974 filed from Jeffrey C.Hoffman,Esq. received from Chambers(case set down for Jan. 21, 1974 Motion for severance as to deft Lester Pape)
1-21-74	Before WEINSTEIN J - Case called -deft PAPE & counsel present - Mr. Shargell atty for deft Michael De Santis present - defts motion for delay of trial argued and denied - motion for severance by deft PAPE -no opposition by Govt - Motion granted - Trial of

DATE	PROCEEDINGS
	deft PAPE to proceed immediately after main case -however motions in advance of trial are not severed as to deft PAPE - SO ORDERED.
1-21-74	Letter to chambers from Dale Quillen, esq. dated 1-17-74 filed Re:for defts Costanza and Jenkins letter to be treated as opposition to any del more than the shortest possible time needed by co-counsel
1-21-74	By WEINSTEIN, J.- Order filed that motion for a delay denied(see second of above letter)
1-22-74	Letter dated Jan. 16, 1974 filed received from Chambers from Gerald Shargel, Esq.
2-4-74	Defts Joint Memorandum of Law filed (JULIANI, WESTLAKE PARDO AND DE SANTIS)
2-4-74	Affidavit of Richard A. Green filed
2-4-74	Notice of Motion filed with defts joint memorandum of law, for suppressing evidence, dismissing the indictment, etc. (ret. 2-4-74)
2-4-74	Before WEINSTEIN J - case called - all defts present with counsels except defts GARY WARREN & MICHAEL DE SANTIS who are fugitives - all motions deemed to be made as to all defts - defts motion to suppress - Hearing ordered and begun - hearing contd to Feb. 5, 1974 at 10:45 am.
2-5-74	Before WEINSTEIN J - case called - defts & counsels present - Hearing resumed - Hearing contd to Feb. 6, 1974.
2-5-74	Affidavit of RICHARD A. GREEN filed.
2-6-74	Before WEINSTEIN J - case called - defts & counsels present - Hearing resumed - Govts motion to amend caption of indictment is granted -Defts motions to suppress are denied - So Ordered - Hearing contd as to the suppression of wire=taps to Feb. 7, 1974 at 11:00 am.
2-7-74	Before WEINSTEIN, J.- Case called- Defts and counsels present- The next of the defts motion to suppress is transferred to the Middle District of Tennessee for the purposes of this hearing- So Ordered Case adjd to 2-13-74 for trial
2-13-74	Before WEINSTEIN J - case called - defts & counsels present - defts not for severance of trial as to defts COSTANZA & JENKINS - Govt consents - granted as indicated defts COSTANZA , JENKINS & PAPA waive their rights to a speedy trial - defts WARREN & URETA reported fugitives - trial adjd without date as to deft PAPE - Aguda Pizzoro sworn as interpreter for deft PARDO. Superseding Informations filed as to defts LOMBARDO, PARDO , JULIANI, WESTLAKE & DE SANTIS - all these defts plead guilty as charged - Indictment numbers 74 CR-104 to 74 CR 108 relate. Sentences adjd without date in relating cases.
2-13-74	Court Ex. #1 and #2 filed.
2-13-74	Stenographers transcript filed dated Feb. 4, 1974.



## CRIMINAL DOCKET

DATE	PROCEEDINGS
2-14-74	3 stenographers transcripts filed (pgs 203 to 560)
2-22-74	Stenographers transcript filed dated 2-14-74.
3-7-74	Magistrate's files 73 M 1635, 1640, 1715, and 1716 inserted into CR
4-22-74	By WEINSTEIN J - Memorandum and Order filed dismissing the Indictment as to deft Fernando Pardo without prejudice, subject to a motion to reinstate should sentencing not be consummated in 74 CR-105.
5-3-74	Before WEINSTEIN J - On motion of AUSA HEINEMANN the Indictment is dismissed as to defts PARDO, JULIANI, WESTLAKE, DE SANTIS (Michael and Neil)
5-3-74	By WEINSTEIN J - Order of dismissal filed (PARDO, JULIANI, WESTLAKE MICHAEL & NEIL DE SANTIS)
6-17-74	Bench Warrant retd and filed - Executed (WARREN)
6-17-74	Before WEINSTEIN J - case called - deft WARREN & counsel Edward Kelly of Legal Aid present - deft produced in court on a bench warrant - deft arraigned and enters a plea of not guilty trial set for June 24 1974 - bail set at \$200,000.00.
6-24-74	Before WEINSTEIN J - case called for trial - deft GARY WARREN not present - counsel E. Kelly of Legal Aid present - trial set for June 25, 1974.
6-24-74	By WEINSTEIN J - Order filed that the deft NEIL LOMBARDO be permitted to surrender directly the <sup>Federal Corr. Facility</sup> <del>ExCt.</del> at Morgantown, West. Va.
6-25-74	Before WEINSTEIN, J. - Case called - Deft and counsel present. Hearing determine if the deft's constitutional rights were offended. Hearing ordered and begun - Hearing concluded - Court finds that the deft's constitutional rights were not violated - Findings of fact and conc of law read into record - Court has jurisdiction to try case - Deft draws his plea of not guilty and having been advised of his rights by the court and on his own behalf enters a plea of guilty to cour Sentence adjd without date - Deft in custody (GARY WARREN)
6/28/74	Stenographer's transcript of 6/25/74 filed
7-12-74	Letter dated July 11, 1974 filed received from Chambers (deft De Santis) from counsel for deft Gerald Shargel, Esq.
7-12-74	By WEINSTEIN J - Order filed that the deft shall submit an order approved as to form by the U.S. Attorney. This Letter and Order shall be sealed. The Clerk will notify the counsel by telephone. So Ordered (see notation on page 2 of letter from counsel)

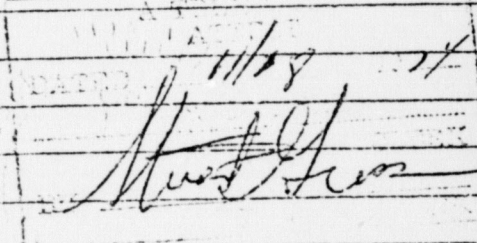
DATE	PROCEEDINGS
7-15-74	Before WEINSTEIN J - case called - On motion of AUSA Levin-Epstein the Indictment is dismissed as to defts CHARLES COSTANZA, NANCY JENKINS & LESTER PAPE.
7-15-74	By WEINSTEIN J - Order of dismissal filed (COSTANZA, JENKINS & PAPE)
7-18-74	By WEINSTEIN, J.- Order filed that the Warden of the Federal Correctional Facility at Petersburg, W. Va permit the deft to marry, while in custody etc. (MICHAEL DE SANTIS) (note that this order and letter filed 7-12-74 (dated 7-11-74) ordered sealed by the court
8-22-74	Notice of Motion filed, ret. 9-12-74, for reduction of sentence imposed (deft MARY WESTLAKE)
8-23-74	Notice of Motion filed, re deft PARDO for reduction of sentence imposed under Rule 35 etc. (forwarded to Chambers)
8-23-74	By WEINSTEIN J - Order filed on motion for reduction of sentence (Pardo) motion will be heard on 9-4-74 at 11:00 am. (Parties notified)
8-28-74	Notice of Motion filed under Rule 35 for reduction of sentence imposed (defts Neil Lombardo and Michael De Santis)
9/4/74	Before WEINSTEIN, J.- Case called- Motion (Rule 35-F. Pardo) argued- Decision reserved.
9-4-74	Notice of motion for reduction of sentence filed (DEBORAH JULIANI)
9-9-74	By WEINSTEIN J - Order filed setting case for 9-23-74 at 2:30 am to show why case should not be dismissed for failure to prosecute (Ureta)
9-9-74	By WEINSTEIN J - Order filed that matter will be heard on 9-12-74 at 10:00 am (for reducing sentence of defts Lombardo & De Santis)
9-12-74	Before WEINSTEIN J - case called - defts not present - counsels present Motion by deft MARY WESTLAKE for reduction of sentence argued and decision reserved; motion by deft Frank Juliani for reduction of sentence argued and denied; motion by deft DEBORAH JULIANI for reduction of sentence is argued and granted - sentence reduced to probation pursuant to 18:5010(a) of the Youth Correction Act with special conditions that deft is not to have anything to do with drugs. Atty may hand deliver copy of Order to the institution; motion by deft MICHAEL DE SANTIS for reduction of sentence argued and granted - sentenced reduced to 5 years probation pursuant to 18:5010(a) of the Y.C.A. motion by deft NEIL LOMBARDO for reduction of sentence argued and granted - sentence reduced to probation for the duration of his minority beginning 10-1-74 pursuant to 18:5010(a) of the Youth Correction Act.
9-12-74	Amended Judgments & Order of Probation filed for defts. DEBORAH JULIANI, MICHAEL DE SANTIS AND NEIL LOMBARDO.



73 CR 961

## CRIMINAL DOCKET

DATE	PROCEEDINGS
9-23-74	Before Weinstein J - case called for review(Maria Ureta) deft & counsel not present - Conference held and concluded - case adjd without date.
9/27/74	Letter dated 9/24/74 filed from E. Kelly to J. Weinstein that deft is available for sentencing.
9/27/74	By WEINSTEIN, J.- Order dated 9/25/74 filed that counsel will arrar with my chambers for a sentence date.
10/15/74	Letter from Gustave Newman, esq. to chambers filed re:deft PARDO a motion for reduction of sentence
10/15/74	By WEINSTEIN, J. Deft's motion to reduce sentence is denied(order on bottom of above letter
10-18-74	Before WEINSTEIN J - case called - deft WARREN & counsel Edward Kelly of Legal Aid present - deft sentenced to 6 years imprisonment plus 10 year special parole term to run concurrent with the sentence imposed by the U.S.D.C. in Florida - Minutes of sentence ordered sealed.
10-18-74	Judgment and Commitment filed - certified copies to Marshal (WARREN)
10-18-74	Certified copy of Judgment & Commitment ret'd and filed - Deft WARREN delivered to Federal Det. Headquarters.
10/22/74	Notice of appeal filed (WARREN)
10/22/74	Docket entries and duplicate of notice of appeal mailed to court appeals (WARREN)
11/18/74	Record on appeal certified and handed to Joan Gill for delivery court of appeals (WARREN)

11/18/74  


EJB:GLH:mt  
F. #733928

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

CHARLES COSTANZA, a/k/a  
"Buddy"

NANCY JENKINS

FERNANDO PARDO

DEBORAH JULIANI

LESTER PAPE

MARY WESTLAKE

GARY WARREN, a/k/a

Michael Canna

MICHAEL DE SANTIS

NEIL DE SANTIS

MARIA URETA,

Defendants.

----- X

THE GRAND JURY CHARGES:

FILED  
U.S. DISTRICT COURT E.D. N.Y.

NOV 1 1973

TIME A.M. ....  
P.M. ....

Cr. No. ....  
(21 USC, §846 and §963)

73 CR 961



COUNT ONE

From on or about the 1st day of September 1972 up until the date of filing of this indictment, within the Eastern District of New York and elsewhere, CHARLES COSTANZA, a/k/a "Buddy", NANCY JENKINS, FERNANDO PARDO, DEBORAH JULIANI, MARY WESTLAKE, GARY WARREN, a/k/a Michael Chunn, MICHAEL DE SANTIS, NEIL DE SANTIS, MARIA URETA, the defendants, and others known and unknown to the Grand Jury, wilfully, knowingly and unlawfully did conspire together and with each other to violate Sections 812, 841(a)(1), 841(b)(1)(A), 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

B 1. It was a part of said conspiracy that the defendants and co-conspirators knowingly and intentionally would import quantities of cocaine, a Schedule II narcotic drug controlled substance, into the United States from places outside thereof.

2. It was further a part of said conspiracy that the defendants and co-conspirators knowingly and intentionally would distribute and possess with intent to distribute quantities of cocaine, a Schedule II narcotic drug controlled substance.

(1A)

3. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed within the Eastern District of New York and elsewhere.

O V E R T      A C T S

1. On or about October 5, 1972, the defendant MARY WESTLAKE traveled by airplane carrying one kilogram of cocaine from Bogota, Colombia to Miami, Florida.

2. On or about February 20, 1973, the defendant CHARLES COSTANZA, a/k/a "Buddy", the defendant NANCY JENKINS, the defendant FERNANDO PARDO, the defendant DEBORAH JULIANI, and the defendant LESTER PAPE met with one Bruce Winokour in the Carriage House Hotel, Manhattan, New York.



3. On or about April 11, 1973 the defendant DEBORAH JULIANI placed a telephone call from Brooklyn, New York, to the defendant FERNANDO PARDO in Bogota, Colombia.

4. On or about April 18, 1973, the defendant GARY WARREN, a/k/a Michael Chunn traveled by airplane with one Vicky Thesman from Bogota, Colombia to Miami, Florida.

5. On or about August 1, 1973 the defendant NEIL DE SANTIS carried approximately one and one-half ounces of cocaine into the Tiffany Diner, Brooklyn, New York.

6. On or about August 1, 1973, the defendant MICHAEL DE SANTIS received \$1500 (Fifteen Hundred Dollars) in the men's room of the Tiffany Diner, Brooklyn, New York.

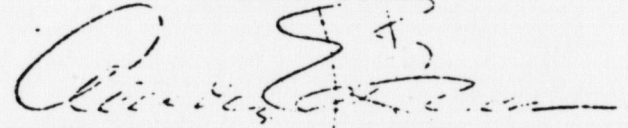
7. On or about October 12, 1973, the defendant MARIA URETA placed a telephone call from the Lexington Hotel, Manhattan, New York to telephone number 372-8714 in Brooklyn, New York. (Title 21, United States Code, §846 and §963).

2A

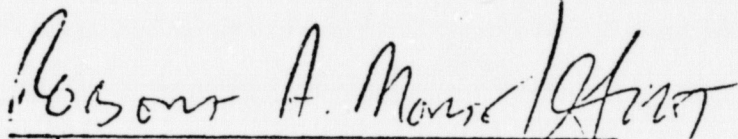
COUNT TWO

On or about August 1, 1973, within the Eastern District of New York, the defendant MICHAEL DE SANTIS and the defendant NEIL DE SANTIS knowingly and intentionally did distribute approximately one and one-half ounces of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1)).

A TRUE BILL.



Foreman.

  
United States Attorney



INFORMAL OPINION  
OF THE DISTRICT COURT ON  
THE JURISDICTION ISSUE

1 undoubtedly in violation of the criminal laws of  
2 Colombia.

3 THE DEFENDANT: Can I say something your Honor.

4 MR. KELLY: No.

5 THE COURT: It was perfectly justified I  
6 think, assuming there were United States Agents  
7 involved which I am not sure about, but assuming  
8 there were, a false United States Passport was being  
9 used and it was appropriate for United States Agents  
10 to be cooperating with Colombian Agents in such an  
11 investigation of the violation of both Colombian  
12 and American criminal law. Certainly no improper  
13 conduct on the part of the American or Colombian  
14 Agents is shown.

15 The defendant then went to Ecuador. He was in  
16 Ecuador in violation, undoubtedly, of the Ecuadorian  
17 criminal law because he was using a false passport  
18 and gained entry into that country using a false  
19 passport.

20 He entered Brazil using a false passport in  
21 violation of the laws of Brazil. He also obtained  
22 a false work permit, undoubtedly in violation of  
23 the criminal laws of Brazil. It was perfectly  
24 appropriate for him to be investigated by Brazilian  
25 Authorities and to be taken in for questioning. Having



1 entered the country illegally and being there  
2 illegally it was appropriate for him to be expelled.  
3 He had no business being in Brazil under a false  
4 passport and it would have been appropriate, I think  
5 under the laws of most civilized nations to handle  
6 the matter in just that way.

7 The defendant had no right to be in the country  
8 and had falsely entered, that is he had entered using  
9 false credentials. They had a right to put him on  
10 the plane to send him out and since he was an  
11 American Citizen the place to send him was back  
12 to America. I think that would standard practice  
13 throughout the world.

14 There is no indication at all that the  
15 American Authorities participated in any of the  
16 activities in Brazil and it was perfectly appropriate  
17 for the Brazilian Authorities to contact American  
18 Authorities by telephone, as your client has testified,  
19 and the defendant has testified, to determine whether  
20 there was a man like Alcorta or Mr. Smith or whether  
21 he was in fact Mr. Warren or Michael Chunn. No  
22 physical violence was used at any time.

23 Lack of a hearing was apparently a result not  
24 of an attempt to deny the defendant any of his  
25 Brazilian rights, whatever they might have been, but

1 rather an attempt to show some compassion towards  
2 his pregnant wife.

3 I do not see in what way the American Authorities  
4 can be said to be at all at fault or to have violated  
5 this defendant's Constitutional Rights.

6 If you want a short recess to give me the  
7 cases you are relying upon I will be happy to give  
8 it to you. I see not point in continuing the hearing  
9 further under these circumstances.

10 MR. KELLY: I do not have any cases other  
11 than the Toscannino Case.

12 THE COURT: Let me have the slip sheet and I  
13 will look at it again.

14 MR. KELLY: The point I am making, your Honor,  
15 is that the very fact that the defendant left Colombia,  
16 I think, if we take his testimony as true, was done  
17 partly through the instigation of American authorities.

18 THE COURT: I see no basis at all for that.

19 MR. KELLY: I would say the same situation  
20 arose in Brazil. It was through the pressure  
21 exerted by American authorities that this defendant  
22 who had lived placidly in Brazil for eight months  
23 was taken into custody.

24 THE COURT: He was living under a fraudulent  
25 passport and using fraudulent work papers.



1 MR. KELLY: Well, I understand that.

2 THE COURT: I do not understand. Anybody  
3 in this country who used these techniques would be  
4 thrown out of the country too.

5 MR. KELLY: That person, I believe, would  
6 have proceedings before the Immigration Service  
7 before that was done to protect his rights.

8 THE COURT: We do not have to force other  
9 countries to give the same degree of due process  
10 as we give in this country. Certainly the procedures  
11 are not uncivilized as they have been described here.

12 MR. KELLY: It is true what your Honor says.  
13 I am just indicating as part of what happened to  
14 the defendant, taking that as part of a whole  
15 context in which he was given no rights under  
16 Brazilian law or United States law because the  
17 United States if they --

18 THE COURT: What rights could the United  
19 States give him in Brazil or Colombia or Ecuador?

20 MR. KELLY: They could make sure of his  
21 rights as an American Citizen by returning him to  
22 the United States according to the legal channels.  
23 There is an extradition treaty with Brazil.

24 THE COURT: I do not understand how this  
25 country can control Brazilian activities. We have

1 no right to interfere with the internal operations  
2 in Brazil. I do not understand what you expected  
3 the country to do.

4 MR. KELLY: I think under very suspicious  
5 circumstances this defendant was expelled not to  
6 some other country but was expelled by placing him  
7 on board an American airline.

8 THE COURT: Where would they expel him to?  
9 There is no other place to send him -- to Saudi Arabia?  
10 No other country in the world would take him except  
11 his place of citizenship. I do not understand what  
12 you expected the Brazilian people to do when they  
13 had a man illegally in their country, using a false  
14 passport, who was concededly and American citizen  
15 using a false American passport. What else were they  
16 to do but put him on a plane back to this country.

17 MR. KELLY: Well he had come from other  
18 countries in South America, he could have been sent  
19 to other countries?

20 THE COURT: Where?

21 MR. KELLY: He could have been sent back to  
22 the country he came from.

23 THE COURT: Ecuador would not take him, he  
24 was using false Ecuadorian visa.

25 MR. KELLY: We do not know that just because



1 nobody asked anybody else what to do.

2 THE COURT: Why should they ask anybody?  
3 The man is there illegally. He was in all these  
4 countries he described illegally and none of them  
5 would have taken him had they known the situation.

6 MR. KELLY: Well, it seems to me there ought  
7 to be procedures for doing these things in a regular  
8 way.

9 THE COURT: Where, in Brazil?

10 MR. KELLY: In any civilized country.

11 THE COURT: But I cannot control Brazilian  
12 procedures. There is no showing whatsoever that  
13 anything illegal was done by American officials,  
14 which is of what is of concern here.

15 We will take a recess so that you may give  
16 me the cases you rely upon and you better give  
17 me a more coherent theory than I understand your  
18 theory presently is. We will adjourn until 2:30.

19 MR. KELLY: I do not have any more cases to  
20 offer your Honor. I was relying on Toscannino.

21 THE COURT: That is not very helpful.

22 MR. KELLY: Indicating perhaps because of  
23 what was said in the Toscannino case, that it could  
24 be extended to cover a situation which I admit is  
25 distinguishable.

1 THE COURT: It is not very helpful to me.  
2 You had better rely on specific language or specific  
3 theory, not just throw a case at me. I do not have  
4 the case before me. We will adjourn until 2:30.

5 (Whereupon the matter was adjourned to  
6 2:30 o'clock p.m. of the same day.)  
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SS/LH  
1/1

## A F T E R N O O N   S E S S I O N

2:30 P.M.

THE COURT: Any further material that either side wants to present?

MR. KELLY: No, I have nothing further.

MR. HEINEMANN: No, your Honor, except that I do not have today any translations of the Brazilian law with respect to the procedures for expulsion and deportation. My position would be that if the United States Government did not itself get involved in anything that could be nearly called a due process violation, that whether Brazil acted within its own rules would be irrelevant, but I would make an offer of proof that there is a procedure under Brazilian law for the expulsion and deportation of citizens that the Government deems undesirable.

THE COURT: I assume it's the case and the cases contruing Rule 44.1 I think it is, of the Rules of Civil Procedure, which apply in the situation through the Federal Criminal Rules. I will assume that they have such procedure in the absence of any material submitted by either counsel.

"The findings of fact I made this morning are my findings of fact and I give the maximum possible weight to the testimony of the defendant.

1           Toscannino decided by the United States Court of  
2           Appeals, May 15th, 1974, slip sheet pages 3514-3515,  
3           placed down as the holding of that case that Ker does  
4           not apply where a defendant has been brought into  
5           the District Court's jurisdiction by forceable  
6           abduction in violation of a treaty."

7           This defendant was not brought in by abduction.  
8           No treaty was violated.

9           The line of cases that apply in this situation  
10          is stated and referred to in footnote 9. The  
11          slip sheet at Page 3517 "The Consitution, of course,  
12          applies only to the conduct abroad of Agents acting  
13          on behalf of the United States. It does not govern  
14          the independent conduct of foreign officials in  
15          their own country. Whether or not the United States  
16          Officials are substantially involved or foreigners  
17          are acting as their agents or employees, is a  
18          question of fact to be resolved in each case."

19          I find, as a matter of fact, that United  
20          States Officials were not substantially involved.

21          Other cases taking the same position are  
22          Kilday v. United States, 481F 2d, 655 at 656; also,  
23          United States v. Tierney, 448 F 2d, 37; United States  
24          v. Shea, 436 F 2d, 740 at 741; United States v.  
25          Nagelberg, 434 F 2d 585 at 587, Footnote 1; Stonehill



1 v. United States, 405 F 2d, 738 at 743; Brulay v.  
2 United States, 383 F 2d, 345 at 348 and the offer  
3 cited, Birdsell v. United States, 346 F 2d, 775 at  
4 782, an opinion by Judge Friendly sitting by  
5 designation in the 5th Circuit.

6 Procedures used by the Brazilian authorities  
7 were in fact not shocking and did not violate any  
8 concept of Roachin. This defendant's rights under  
9 the Constitution of the United States were not  
10 violated. This Court has jurisdiction to proceed  
11 in this case.

12 This constitutes findings of fact in law  
13 and the full hearing required under the Toscanino  
14 decision. If, of course, Toscanino is reversed  
15 by the Supreme Court, then A'fortiori, this Court  
16 has jurisdiction in this case.

17 Any further findings of fact of law that the  
18 defendant would like?

19 MR. KELLY: No, Judge.

20 THE COURT: The Government?

21 MR. HEINEMANN: No.

22 THE COURT: I'll hear your plea.

23 MR. KELLY: Judge, again, if we can reserve  
24 at this point of appeal with the consent of the  
25 Court and the United States Attorney, the defendant

Certificate of Service

JANUARY 2, 1975

I certify that a copy of this brief and appendix  
has been mailed to the United States Attorney for the  
Eastern District of New York.

Phyllis Shook Beninger



